



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its  
Attorney General Warren Spannaus,  
its Department of Health, and its  
Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;  
HOUSING AND REDEVELOPMENT AUTHORITY  
OF ST. LOUIS PARK; OAK PARK VILLAGE  
ASSOCIATES; RUSTIC OAKS CONDOMINIUM  
INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT  
REILLY TAR & CHEMICAL CORPORATION'S MOTION TO DISMISS  
COMPLAINT OF UNITED STATES OF AMERICA

INTRODUCTION

The plaintiff in this case, the United States of America, filed suit on September 3, 1980, on behalf of the Administrator of the United States Environmental Protection Agency (hereinafter "EPA"), against the defendant Reilly Tar & Chemical Corporation (hereinafter "Reilly Tar") pursuant to Section 7003 of the Resource Conservation and Recovery Act

of 1976 (hereinafter "RCRA"), 42 U.S.C. §6973. The United States seeks injunctive relief to abate an imminent and substantial endangerment to health and the environment which now exists and was created by the activities of Reilly Tar during its operation, between 1917 and 1972, of a creosote refinery and wood preservative plant in St. Louis Park, Minnesota. <sup>1/</sup> As described in the complaint, hazardous wastes spilling and leaking and which were placed by Reilly Tar into and upon the ground on and near the Reilly Tar property have contaminated and will continue to contaminate groundwater which is used as a water supply for the City of St. Louis Park and neighboring communities. The hazardous wastes disposed of by Reilly Tar include substances which cause cancer and are toxic. <sup>2/</sup>

Reilly Tar filed its motion to dismiss on March 4, 1981. Reilly Tar argues that the complaint must be dismissed for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. In addition, the defendant argues that most of the prayers for relief must be dismissed from the complaint because they are not authorized by Section 7003, 42 U.S.C. §6973.

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<sup>1/</sup> The complaint also names as defendants the Housing and Redevelopment Authority of St. Louis Park, Oak Park Village Associates, Rustic Oaks Condominium, Inc., and Philip's Investment Co., the present owners of the land upon which Reilly Tar's plant was located. The State of Minnesota and the City of St. Louis Park were granted leave to intervene as plaintiffs in the case on October 15, 1980. The City of Hopkins moved to intervene as a plaintiff on May 26, 1981. The State of Minnesota filed an Amended Complaint in Intervention on May 27, 1981.

<sup>2/</sup> For the purposes of the present motion to dismiss, all the allegations in the complaint must be accepted as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). For a further statement of the facts of this case, see the Affidavit of David Giese, attached to Plaintiff-Intervenor State of Minnesota's Memorandum in Opposition to the Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the State's Complaint in Intervention (hereinafter "Minnesota brief").

Reilly Tar contends that Section 7003 of RCRA is jurisdictional only and creates no substantive liability. Statement of Points and Authorities in Support of Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaint of Plaintiff United States of America (hereinafter "Reilly Tar brief") at 7-13. It argues that since Section 7003 is jurisdictional only, "the applicable standards of liability might be found, in an appropriate case, in the regulations under RCRA, or in the federal common law of nuisance." Reilly Tar brief at 13. Reilly Tar then argues that the United States has failed to meet three jurisdictional or evidentiary tests which must be met in order for a suit to be brought under Section 7003. First it argues that Section 7003 can only be used to restrain ongoing human activity and that such activity does not exist in this case. Reilly Tar brief at 13-39. The second requirement that Reilly Tar asserts the plaintiff has failed to meet is that of alleging an interstate effect by the pollution. Reilly Tar brief at 39-48. The third test which Reilly Tar believes the plaintiff has not met is the requirement for an imminent and substantial endangerment. Reilly Tar brief at 48-53. The defendant concludes its argument by asserting that most of the relief sought by the plaintiff cannot be granted because it goes beyond enjoining ongoing human activity or abating an immediate emergency. Reilly Tar brief at 55-58.

In this memorandum, the plaintiff will show that all of Reilly Tar's arguments for dismissal are specious, distorting the meaning and intent of Section 7003. The

plaintiff will show that the complaint states a claim pursuant to Section 7003, that there exists subject matter jurisdiction, and that none of the claims for relief should be struck.

While the United States agrees that Section 7003 is jurisdictional, it does not agree that it is only jurisdictional. Section 7003 of RCRA also creates substantive liability which is fashioned with other law as a guide, such other law including the statute in which Section 7003 is found, the federal common law of nuisance, and state law. As to whether or not the United States has met all of the jurisdictional or evidentiary requirements to maintain a Section 7003 action, the plaintiff asserts it has. A complaint need not allege ongoing human activity in order to state a claim pursuant to Section 7003. The law requires only that the activity may present an imminent and substantial endangerment at the present time, no matter when the human activity took place. In addition, no allegation of an interstate effect of the pollution need be alleged. Furthermore, the complaint does allege an imminent and substantial endangerment as required by Section 7003. Finally, the United States will show that Section 7003 provides for relief beyond enjoining ongoing human activity or abating an immediate emergency.

#### I. ARGUMENT

##### SECTION 7003 IS JURISDICTIONAL AND ALSO CREATES SUBSTANTIVE LIABILITY.

The statutory provision which this Court is being asked to interpret, Section 7003 of RCRA, 42 U.S.C. §6973, is relatively short and straightforward. It provides in pertinent part as follows:

Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation, or disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit.<sup>3/</sup>

There is no dispute among the parties as to whether or not the provision establishes jurisdiction for the United States to sue to seek equitable relief. The parties agree that Section 7003 is jurisdictional. However, the defendant contends that Section 7003 is merely jurisdictional and does not establish substantive liability. See Reilly Tar brief at 9. The United States disagrees. The provision does create substantive liability.

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<sup>3/</sup> Section 7003 was amended by the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482 (Oct. 21, 1980), 94 Stat. 2348. At the time the complaint in this case was filed, Section 7003 read, in pertinent part, as follows:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to the alleged disposal, to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit.

The plaintiff will file an amended complaint taking the amendment into account in the near future.

Section 7003 of RCRA, entitled "Imminent Hazard", allows the federal government to seek injunctive relief in federal court when an imminent and substantial endangerment to health and the environment may be presented by the handling, storage, treatment, transportation or disposal of solid or hazardous waste. The fact that Section 7003 begins with the phrase "Notwithstanding any other provision of this Act ...." makes clear that its use is independent of other provisions, including the regulatory provisions, of RCRA. It is similar to imminent hazard provisions providing for injunctive relief found in other environmental laws. See Section 504 of the Clean Water Act, 33 U.S.C. §1364; Section 303 of the Clean Air Act, 42 U.S.C. §7603; Section 7 of the Toxic Substances Control Act, 15 U.S.C. §2606; and Section 1431 of the Safe Drinking Water Act, 42 U.S.C. §1431.

The substantive standard found within Section 7003, which must be met to obtain judicial relief under that section, is that the disposal of hazardous waste may present an imminent and substantial endangerment to health or the environment.<sup>4/</sup> In a recent opinion denying a motion for summary judgment filed in a case brought pursuant to Section 7003 and the federal common law of nuisance, United States of America v. Diamond Shamrock Corporation, N.D. Ohio, Civil Action No. C80-1857 (May 29, 1981), a district court discussed this standard while concluding that Section 7003 is substantive as well as jurisdictional:<sup>5/</sup>

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<sup>4/</sup> See Part IV, above, for discussion of the meaning of the phrase "imminent and substantial endangerment". Also see Parts I and II of the Minnesota brief.

<sup>5/</sup> The May 29, 1981 order is attached to this brief as Attachment 1.

The Court notes, however, that §6973 is both jurisdictional and substantive in nature. The standard for determining the impropriety of the conduct sought to be enjoined is provided by §6973 to be whether a "hazardous waste" presents an "imminent and substantial endangerment to health or the environment."

§6973 provides for injunctive relief in emergency situations which the EPA Administrator discretionally determines, upon receipt of evidence, to warrant immediate abatement. The environmental endangerment must be both imminent and substantial, concepts with rich judicial and statutory histories. [May 29, 1981 order at 4-5]

In support of its conclusion that Section 7003 is substantive, the District Court in Diamond Shamrock relied upon United States v. Vertac Chemical Corporation, 489 F. Supp. 870 (E.D. Ark., 1980). In that case, the district court, following the guidance of the Eighth Circuit in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir., 1975) (en banc), held, after a hearing on a motion for a preliminary injunction, that the "escape of dioxin into Rocky Branch Creek and Bayou Meto from the plant site constitutes 'an imminent and substantial endangerment to the health of persons' (33 U.S.C. §1364, 42 U.S.C. §6973) and is subject to abatement." 489 F. Supp. at 885 (footnote omitted). Similarly, after the facts are presented in this case, this Court should determine whether the escape of hazardous wastes from the Reilly Tar site may present an imminent and substantial endangerment to health or the environment within the meaning of Section 7003.

The best evidence in the Eighth Circuit of how Section 7003 creates substantive liability is found in the court's discussion concerning a similar statutory provision

in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th. Cir., 1975) (en banc). While rejecting claims based on the federal common law of nuisance, the Eighth Circuit upheld the determination by the District Court for the District of Minnesota that Reserve Mining Company's discharge into Lake Superior "constitutes pollution of waters 'endangering the health or welfare of persons' within the terms of §§1160(c)(5) and (g)(1) of the Federal Water Pollution Control Act and is subject to abatement." 514 F.2d at 529.

Section 1160(g)(1) of the Federal Water Pollution Control Act was very similar in structure to Section 7003 of RCRA. It provided as follows:

(g) If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Administrator --

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution...

Like Section 7003 of RCRA, the Federal Water Pollution Control Act provision states that the Administrator of EPA may seek equitable relief in court if there exists pollution endangering the health of persons.

The Eighth Circuit viewed Section 1160(g)(1) as creating substantive liability. It considered the evidence of endangerment of health as going to proof of the government's claim and not merely as a jurisdictional precondition to proof of a claim:

An action under the FWPCA requires proof of an additional element. The United States must establish that the water pollution which is violative of state quality standards is also "endangering the health or welfare of persons." §1160(g)(1)...The record shows that Reserve is discharging a substance into Lake Superior waters which under an acceptable but unproved medical theory may be considered as carcinogenic. As previously discussed, this discharge gives rise to a reasonable medical concern over the public health. [514 F.2d at 528-529.]

Similarly, in Section 7003, the statutory language establishes substantive liability as well as the jurisdictional requirements for suit.

The fact that Section 7003 creates substantive law, however, does not exclude consideration of other sources as an aid in fashioning the content of that law. This was explained by the Supreme Court in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). In that case, the Supreme Court concluded that Section 301 of the Labor Management Relations Act of 1947 was "more than jurisdictional and authorized federal courts "to fashion a body of federal law." 353 U.S. at 451. <sup>6/</sup> The Court stated that it

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6/ Section 301 provides as follows:

(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

(b) "Any labor organization which represents employees in any industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

"would undercut the Act and defeat its policy if we read §301 narrowly as only conferring jurisdiction..." 353 U.S. at 456. It then went on to discuss the sources for fashioning the substantive law of Section 301, including the policy of the Labor Management Relations Act and state law. 353 U.S. at 456-457. The Supreme Court's reasoning concerning Section 301 would apply to Section 7003 of RCRA as well. The Court can look to other sources in fashioning the substantive law of Section 7003, including the policy of the statute in which the provision is found and state law. <sup>7/</sup>

Reilly Tar cites to the opinions in two cases concerning Section 7003 as support for its assertion that Section 7003 is merely jurisdictional: United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (N.D. Ind., 1980) and United States v. Solvents Recovery Service of New England, et al., 496 F. Supp. 1127 (D. Conn. 1980). However, while the two courts in those cases appear to have concluded that Section 7003 does not establish substantive liability, they did not rule in a manner consistent with that conclusion. Rather than dismissing the complaints of the United States, as would be appropriate if Section 7003 were merely jurisdictional,

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<sup>7/</sup> The incorporation of nuisance law, in particular, into Section 7003 was recognized by Congress in a 1979 Senate Report on proposed amendments to RCRA, which were enacted in 1980: "Section 7003 therefore incorporates the legal theories used for centuries to assess liability for creating a public nuisance (including intentional tort, negligence, and strict liability) ..." S. Rep. No. 96-172, 96th Cong. 1st Sess. at 5. A similar acknowledgement of the incorporation of nuisance law theories into Section 7003 is also contained in the Eckhardt Report, a Congressional report on hazardous waste disposal prepared in 1979, after extensive hearings, by the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce (96th Cong., 1st Sess., Sept. 1979), Committee Print 96-IFC 31 (hereinafter "Eckhardt Report").

both courts upheld the validity of the plaintiff's claims brought under Section 7003. Indeed, after stating that Section 7003 was only jurisdictional, the district court in Midwest Solvent Recovery issued a preliminary injunction. 484 F. Supp. at 144-145.

It appears that while making statements to the contrary, the courts in Midwest Solvent Recovery and Solvents Recovery Service of New England were actually acting in accordance with the position of the plaintiff. The standards which the Court in Solvents Recovery Service of New England said were "found elsewhere in RCRA or in the regulations promulgated pursuant to RCRA, or in the federal common law of nuisance..." were, in reality, being incorporated by the courts into the substantive law of Section 7003. 496 F. Supp. at 1134 (footnotes omitted). <sup>8/</sup>

II. THE COMPLAINT STATES A CLAIM  
ABSENT ALLEGATIONS OF PRESENT  
ACTIVITY BY REILLY TAR

Reilly Tar's main argument for dismissal is that Section 7003 only authorizes law suits to abate hazards where human activity which is causing the hazard is presently occurring. Reilly Tar brief at 13-39. Reilly Tar is thus arguing that, because all activity by Reilly Tar at its plant in St. Louis Park ceased in 1972, it cannot now be forced to remedy any hazard which has been created by its earlier activities.

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<sup>8/</sup> For additional discussion concerning the errors in the courts' reasoning in Midwest Solvent Recovery and Solvents Recovery Service of New England, see Minnesota brief at 7-8, n. 9.

This argument by Reilly Tar is without any valid support. Neither the language of Section 7003 nor the rest of RCRA indicate this limitation and, in fact, indicate otherwise. Similarly, neither the legislative history nor statements by agency officials can be used to support Reilly Tar's arguments. In addition, such an interpretation would contradict court decisions in Section 7003 cases, as well as in cases concerned with other statutory and common law nuisances.

Reilly Tar's limitation on Section 7003 makes no sense. If, as Reilly Tar concedes, Section 7003 was intended to remedy imminent and substantial endangerments to health and the environment in some cases, see Reilly Tar brief at 2, 31-32, and 38, to draw the line where it has between active sites and abandoned sites, has no rationale to support it. The purpose of the provision, to protect the public and the environment from harm caused by hazardous waste disposal practices not adequately covered by the other provisions of RCRA, could not be accomplished.

A. The Language of RCRA Shows that  
Section 7003 Applies in Cases Where  
Direct Human Activity Has Ceased

An examination of the language of Section 7003 shows that Congress did not specify that direct human activity must be ongoing at the time of suit. The only present requirement is that there may exist an imminent and substantial endangerment to health or the environment at the time of the

suit. The provision does not specify when the handling, storage, treatment, or disposal of solid or hazardous waste which created the endangerment need occur. Reilly Tar is simply incorrect when it argues that the language of Section 7003 requires present acts of handling, storage, treatment, or disposal by Reilly Tar in order for there to be a valid claim against it.

The definition of disposal in Section 1004(3) of RCRA, 42 U.S.C. §6903(3), confirms that Section 7003 applies in cases where direct human activity has ceased.

Disposal is defined as follows:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

The phrase "so that such solid waste or hazardous waste...may enter the environment or be...discharged into any waters, including groundwaters" makes disposal a continuing condition. So long as the possibility remains that the wastes disposed of may enter the environment or be discharged into any waters, it does not matter when the direct human act of disposal occurred. Past human acts of disposal are covered by Section 7003 as long as the wastes "may enter the environment..." <sup>9/</sup>

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<sup>9/</sup> Indeed, the definition of disposal includes the word "leaking" which does not entail any human activity at all.

Reilly Tar cites to a New Jersey case, State v. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977) as support for its view that the definition of disposal contemplates human agency. Reilly Tar brief at 16, n. 7. However, that case, in the end, undercuts Reilly's argument. The New Jersey Court rejected the claim that a later landowner, ICI, was responsible for abating a hazard created by an earlier landowner, Exxon. The court implied that the suit should have been maintained against Exxon, which was, like Reilly Tar in this case, the party responsible for creating the pollution originally. "The State could have sought to have Exxon directed to remedy the condition with the cooperation of ICI. However, the State chose to forego its remedy against Exxon, and the court will not question the wisdom of its choice." 376 A.2d at 1350. Thus, the New Jersey court's reasoning in Exxon would impose liability on Reilly Tar in this case.

Reilly Tar argues that with the exception of two new sections of RCRA added by the Solid Waste Disposal Act Amendments of 1980, Sections 3012 and 3013, the rest of RCRA covers only those activities which continue to operate. Reilly Tar brief at 15, 18-20. The United States asserts that the correct statement is that the regulatory program established by Subtitle C of RCRA, with the exception of new Sections 3012 and 3013, primarily covers activities which continue to operate. However, Section 7003 is not part of the regulatory program of Subtitle C. <sup>10/</sup> As Reilly Tar states, Section 7003

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<sup>10/</sup> Section 7003 is found in Subtitle G.

"is not coordinated with the regulatory scheme of Subtitle C." Reilly Tar brief at 11. <sup>11/</sup> And unlike most of the regulatory program of Subtitle C, Section 7003 is not limited in application primarily to ongoing operations.

New Section 3012 offers support for the conclusion that Section 7003 is not limited in application to ongoing operations. In establishing an inventory system to describe the location of each site "at which hazardous waste has at any time been stored or disposed of," Congress states explicitly that the inventory procedure should not hold up enforcement or remedial actions "with respect to any site at which hazardous waste has been treated, stored, or disposed of." Section 3012 (a) and (d), 94 Stat. 2342 and 2343. <sup>12/</sup> The implication of this requirement is that there exists authority for enforcement and remedial actions for sites at which hazardous waste has been treated, stored, or disposed of in the past. This authority must be found in Section 7003 if anywhere in the statute.

In sum, nothing in the language of RCRA indicates that Section 7003 can be invoked only where direct human activity is occurring at the time of the suit. Rather, the language of the statute indicates that, even if the direct human acts creating the hazard occurred in the past, a suit can be maintained.

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<sup>11/</sup> As discussed in part I, above, the introductory phrase to Section 7003, "Notwithstanding any other provisions of the chapter ..., " confirms the separation of Section 7003 from the rest of RCRA.

<sup>12/</sup> Section 3012(d) provides, in full, as follows:

(d) No impediment to immediate remedial action.-- Nothing in this section shall be construed to provide that the Administrator or any State should, pending completion of the inventory required under this section, postpone undertaking any enforcement or remedial action with respect to any site at which hazardous waste has been treated, stored, or disposed of.

B. The Legislative History of RCRA  
Shows that Congress Intended  
Section 7003 to Apply to Cases  
Where Direct Human Activity  
Has Ceased.

Reilly Tar devotes many pages of its brief to an analysis of the legislative history of RCRA in the hope of establishing that Congress did not intend Section 7003 to apply in cases where hazards to health and the environment have been created by human activities taking place prior to the initiation of the law suit. However, its effort must fail. The legislative history, to the extent it tells us anything about the issue, indicates that Section 7003 is meant to be used, inter alia, for cases where direct human activity creating the hazard has ceased.

In spite of Reilly Tar's attempts to make it appear otherwise, the legislative history of RCRA at the time Section 7003 was passed in 1976 offers no help in determining whether or not that section can be applied in cases involving past human activities. The deletion of the word "causing" from the provision prior to passage, discussed by Reilly Tar on page 22 of its brief, is irrelevant to the issue. Similarly, the amendments to Section 7003 made in 1978 and 1980 shed little light on the issue of past activities. The removal of the word "for" in 1978 and the changing of "is presenting" to "may present" in 1980 have nothing to do with the issue of abandoned and inactive sites. See Reilly Tar brief at 23-25.

However, beginning in 1979, congressional statements began to appear which explicitly state that Section 7003 can be used to remedy hazards from inactive sites. <sup>13/</sup> In the 1979 Eckhardt Report, prepared after extensive Congressional hearings concerned with hazardous waste disposal in the United States, EPA's imminent hazard authority under Section 7003 is discussed. The report states as follows:

As the previous description reveals, RCRA is basically a prospective act designed to prevent improper disposal of hazardous wastes in the future. The only tool that it has to remedy the effects of past disposal practices which were not sound is its imminent hazard authority...Section 7003 is designed to provide the Administrator with overriding authority to respond to situations involving a substantial endangerment to health or the environment, regardless of other remedies available through the provisions of the Act...Imminence in this section applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment. [Eckhardt Report at 31-32, emphasis added.]

An equally strong statement is found in the House Report for the Resource Conservation and Recovery Act Amendments of 1979, H.R. Rep. No. 96-191 (96th Cong., 1st Sess.) at 5:

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<sup>13/</sup> Legislative statements subsequent to passage of RCRA cannot have the weight equal to statements made at the time of passage, but they "are entitled to careful consideration 'as a secondarily authoritative expression of expert opinion'" concerning its proper interpretation. Parker v. Califano, 561 F.2d 320, 339 (D.C. Cir., 1977) (footnote omitted). See also, 2A. A. Sutherland, Statutes and Statutory Construction §49.11 at 266 (4th ed., Sands, ed. 1973); Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329, 343 (5th Cir. 1975).

The Administrator's authority under Section 7003 to act in situations presenting an imminent hazard should be used for abandoned sites as well as active ones. 14/

Reilly Tar cites to legislative history concerning new Section 3012 and 3013 of RCRA as confirming the inapplicability of Section 7003 to past activities. In fact, however, that legislative history supports the applicability of Section 7003.

The statements from the House Report quoted by Reilly Tar on page 26 of its brief were taken out of context by Reilly Tar. They apply, not to Section 7003, but to the regulatory program of Subtitle C. Indeed, when read with the surrounding statements in the report, they show that Congress recognized the need to use Section 7003 to remedy hazards resulting from past activities at presently inactive sites as in this case:

A new issue has arisen which was not evident in 1976: the problem of abandoned hazardous wastes disposal sites. This discovery led to an increased awareness of the gaps in RCRA under Subtitle C, which primarily addressed the cradle-to-grave management of hazardous wastes in new and existing disposal sites. In an attempt to narrow this gap, the Committee amended RCRA to include a new state-wide inventory program (section 3012) for abandoned hazardous wastes disposal sites and to clarify that the Administrator has authority to take action with regard to abandoned and inactive sites.

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14/ The House Report was a prelude to the RCRA amendments passed in 1980 which modified the language of Section 7003. See n. 3 above.

Reilly Tar attempts to discredit the applicability of this statement from the House Report by citing to the rationale used by Supreme Court in SEC. v. Sloan, 436 U.S. 103 (1978). However, the Court's reasoning in that case for excluding a statement in a committee report is not applicable to this case. The House Report statement is not at odds with the language of Section 7003, it is not at odds with the pattern of the statute taken as a whole, and it is not far reaching in terms of any unreviewable power it vests in EPA. Furthermore, if Reilly Tar believes post-enactment legislative history should not be relied upon to interpret Section 7003, then it must excise most of the discussion in its brief concerning legislative history.

This measure is a direct result of concerns expressed during reauthorization hearings. There is agreement that some preliminary measures are needed to immediately address the abandoned sites issue. Some determination of the scope of the problem is required before a new or expanded program can be launched. This provision should be viewed as an initial step toward addressing the abandoned sites problem, and not as a solution.

The committee believes that the Administrator has not been sufficiently vigorous in using the authority under Section 7003 to act in those circumstances which pose an imminent and substantial endangerment to health or the environment. In hearings before the committee the agency acknowledged that the authority had not been used fully, but that the agency has recently filed several legal actions under this section and intends to expand its enforcement program. The committee endorses this intention and the reported bill adds language to the Act to allow the Administrator to act upon receipt of evidence that the handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste may present such an imminent and substantial danger. The committee intends that the Administrator use this authority where the risk of serious harm is present. The committee heard numerous witnesses testify to the dangers and risks associated with hazardous sites which are now abandoned and inactive, as well as active sites. The Administrator's authority under Section 7003 to act in situations presenting an imminent hazard should be used for abandoned sites as well as active ones. [H.R. Rep. No. 96-191 (96th Cong. 1st Sess.) at 4-5 (emphasis added).]

Similarly, the remarks of Representative Gore quoted by Reilly Tar on pages 25 and 26 of its brief, when placed in their proper context, show that Representative Gore was concerned specifically with the Subtitle C regulatory program when he stated that abandoned or inactive sites were not covered by RCRA as it existed at that time. His amendment was aimed at adding provisions which addressed abandoned and inactive sites to the regulatory program. And he specifically distinguished the new measures he was proposing from the existing Section 7003 authority:

My amendment contains the authority to look at these abandoned and inactive sites when there is a reasonable suspicion of a threat to health or the environment. I emphasize a reasonable suspicion of a hazard because my amendment's trigger is clearly divorced from the imminent and substantial endangerment test currently invoked under Section 7003. [126 Cong. Rec. H. 1097 (daily ed. Feb. 20, 1980.)]

The most recent statements indicating that Section 7003 applies in cases where human activity has ceased are found in the House and Senate Reports for the bills that became the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510 (December 11, 1980), 94 Stat. 2767. <sup>15/</sup> The House Report recognized the Section 7003 authority in discussing the weaknesses of RCRA as a whole:

"The Act is prospective and applies to past sites only to the extent they are posing an imminent hazard." H.R. Rep. No. 96-1016 (96th Cong. 2d. Sess., 1980) at 22. The Senate Report acknowledged that suit could be brought against a disposer in the Love Canal situation, which, like this case, involves a site where direct acts of disposal ended years ago: "In cases like Love Canal, where the disposer is known and able to pay, and where there is significant danger, the Federal Government, under the Solid Waste Disposal Act, does have authority to sue the disposer or owner of the disposal site to seek clean up." S. Rep. No. 96-848 (96th Cong., 2d Sess., 1980) at 11.

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<sup>15/</sup> The Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") provides additional authority to respond to releases of hazardous waste from inactive hazardous waste sites endangering public health and the environment. The Amended Complaint in Intervention filed by the State of Minnesota on May 27, 1981, adds a CERCLA claim to this case.

The last type of legislative history statements relied upon by Reilly Tar to support its position are those made and submitted by EPA officials at oversight hearings held in 1978 by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. See Reilly Tar brief at 34-39. The hearings resulted in issuance of the Eckhardt Report which, in spite of EPA statements to the contrary, concluded that Section 7003 "may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment." Eckhardt Report at 32.

The plaintiff agrees that some of the statements quoted by Reilly Tar indicate that some EPA officials, at the time of the hearings, questioned whether Section 7003 could be applied to cases involving inactive sites, such as Love Canal. However, the views of those agency officials were disputed, both by Congress and the U.S. Department of Justice. A report on Hazardous Waste Management and Implementation of the Resource Conservation and Recovery Act, prepared by the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs (96th Cong., 2d Sess., March, 1980) at page 29, indicated congressional disapproval of the views expressed by EPA officials as follows:

EPA has apparently determined that its legal authority is insufficient based on the view that the agency cannot currently take action in hazardous waste situations where a responsible owner with financial resources is not available (according to EPA, this would

include "abandoned sites" such as Love Canal). However, as indicated in the Justice Department memorandum, the Federal Government has sufficient authority to pursue even former owners of a polluting site for remedial efforts. The key to the Section 7003 provision, in this respect lies not with current ownership but with responsibility. Thus, even Love Canal cannot be considered as truly abandoned (despite the fact that Hooker Chemicals and Plastics Corporation is no longer the owner of the site) because of Hooker's continuing responsibility to maintain the site...In fact, the Justice Department, in cooperation with state officials, has recently filed a civil suit against Hooker, based on Section 7003, to recover monies spent to remedy the damages caused by its irresponsible disposal practices at Love Canal. In any event, EPA's interpretation regarding the possible applications of Section 7003 have resulted in less than aggressive use of enforcement actions.

At any rate, the 1978 views of the EPA officials quoted by Reilly Tar have no relevance at this time. Whatever the agency interpretation in 1978, there is no question that EPA now interprets Section 7003 to authorize suits against former owners of inactive sites. <sup>16/</sup> This is attested to by the existence of this case, as well as by the filing of Section 7003 actions to remedy the hazard at Love Canal and other inactive and abandoned sites. See Environment Reporter, Current Developments, Vol. 10, No. 35 (Dec. 28, 1979) at 1743 and Vol. 11, No. 25 (Oct. 17, 1980) at 813.

In sum, Reilly Tar's arguments cannot be sustained that legislative history supports its position that Section 7003 cannot be applied in cases like this one where direct human activity is no longer occurring. Indeed, legislative

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<sup>16/</sup> As stated by the Eighth Circuit in Bookwalter v. Mayer, 345 F.2d 476 at 478 (8th Cir. 1965), "it is well-established that the Government is not bound by an erroneous interpretation of the law made by a subordinate agent."

history demonstrates that Reilly Tar has been properly sued. Even though direct acts of disposal by Reilly Tar may have stopped in 1972, Section 7003 can nevertheless be used to seek abatement of the hazard which now exists.

C. Case Law Indicates that Present Activity by Reilly Tar Need Not Be Alleged to State a Claim

Case law also supports the conclusion that, even though acts of disposal by Reilly Tar ended in 1972, a Section 7003 claim against the company can be maintained. In United States of America v. Diamond Shamrock Corporation, N.D. Ohio, Civil Action No. C80-1857 (May 29, 1981), the district court was faced with the identical issue raised in this case and concluded that Section 7003 is applicable to present conditions resulting from antecedent acts. May 29, 1981 order at 7. In Diamond Shamrock, the United States is seeking injunctive relief to remedy an alleged imminent and substantial endangerment arising from the disposal of chromium wastes by Diamond Shamrock between 1931 and 1972. Both in this case and in Diamond Shamrock, therefore, the direct human activity of disposal allegedly ceased in 1972, four years prior to the enactment of Section 7003. The district court in Diamond Shamrock held that Section 7003 "is applicable to situations wherein the alleged imminent and substantial endangerment to the environment is resultive from acts engaged in antecedent to the enactment of the statute." May 29, 1981 order at 9.

In its opinion, the court in Diamond Shamrock relied in part upon the decision of the district court in United States v. Solvents Recovery Service of New England, et al. 496 F. Supp. 1127 (D. Conn., 1980). In that case, the court also considered the issue of whether ongoing disposal had to be alleged under Section 7003, and it also concluded that such an allegation was not necessary. The court stated that it was "unable to find anything in the statute which would restrict its application to cases in which the government alleges that the disposal continued up to the time of the filing of its lawsuit." 496 F. Supp. at 1139. The court explained further as follows:

In cases involving conditions caused by the disposal of hazardous wastes, section 7003 by its terms requires only that the disposal "is presenting an imminent...endangerment"; it makes no distinction on the basis of the cause of the dangerous condition. Section 7003 does not on its face discriminate between cases of present harm caused by past disposal practices and cases of a present harm caused by ongoing disposal practices. [496 F. Supp. at 1140.]

The court in Solvents Recovery Service of New England pointed to another Section 7003 case, United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980) as support for its conclusion that no "ongoing acts" limitation should be read into Section 7003. The court in Vertac "issued an order for injunctive relief under Section 7003 which required the defendant to contain pollution that could only be traced to acts of disposal antedating the filing of the complaint." 496 F. Supp. at 1140.

The court in Solvents Recovery Service of New England also looked to nuisance law for confirmation of its decision.

496 F. Supp. at 1140. Activities which create an imminent and substantial endangerment to health and the environment are comparable to those activities recognized as subject to suit under nuisance law. As the Seventh Circuit stated in Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 at 1121-1122 (7th Cir. 1976):

Some activities, occupation, or structures are so offensive at all times and under all circumstances regardless of locations or surroundings, that they constitute "nuisance per se." Activities that imminently and dangerously threaten the public health fall into this category.

Nuisance cases do not require present acts to establish a nuisance. As stated in W. Prosser Law of Torts § 87 at 573 (3d ed. 1964) "[Nuisance] has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion." (Footnote omitted.) See also Commonwealth of Pennsylvania v. Barnes and Tucker Company, 319 A.2d 871 at 883 (Penn. Sup. Ct., 1974). Stated another way, "[e]very continuance of a nuisance is held to be a fresh one." P. Ballantine & Sons v. Public Service Corporation of New Jersey, 86 N.J.L. 331 at 337 (N.J. Ct. of Errors and Appeals, 1914). See also Sloggy v. Dilworth, 38 Minn. 179, 36 N.W. 451 (1888).

The reasoning which supports the applicability of Section 7003 to situations where direct acts of disposal are not presently taking place is similar to the reasoning used by courts in upholding legislation making unlawful conditions created by acts performed prior to the enactment of the legislation. For example, in Chicago & Alton Railroad Company v. Tranbarger, 238 U.S. 67 (1915) the Supreme Court upheld a

Missouri law requiring owners of railroads to maintain ditches along rights of way as applied to an embankment erected more than three months prior to enactment of the law. The Supreme Court reasoned as follows:

The argument that in respect of its penalty feature the statute is invalid as an ex post facto law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act of 1907, but because after that time it maintained the embankment in a manner prohibited by that act. [238 U.S. at 73, emphasis added.]

See also, Mugler v. Kansas, 123 U.S. 623, 672 (1887); Samuels v. McCurdy, 267 U.S. 188, 193 (1924); Queenside Hills Realty Co., Inc. v. Saxl, 328 U.S. 80, 83 (1945). Similarly, under Section 7003, it is not the specific act of disposal which is the concern of the provision, but the continuation of the condition created by the act of disposal.

In City of Bakersfield v. Miller, 48 Cal. Rptr. 889, 410 P.2d 393 (Cal. Sup. Ct., 1966), the Court was concerned with fire safety requirements as applied to buildings which were constructed prior to enactment of the fire safety code. The Supreme Court of California upheld the requirements, stating as follows:

The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance. (Queenside Hills Co. v. Saxl (1946) 328 U.S. 80, 83, 66 S. Ct. 850, 90 L. Ed. 1096; Knapp v. City of Newport Beach (1960) 186 Cal. App. 2d 669, 681, 9 Cal. Rptr. 90.) In this action the city does not seek to impose punitive sanctions for the methods of construction used in 1929, but to eliminate a presently existing danger to the public. It would be an unreasonable limitation on the powers of the city to require that this danger be tolerated ad infinitum merely because the hotel

did not violate the statutes in effect when it was constructed 36 years ago. [410 P.2d at 399.]

Again, Section 7003, like the fire safety code, is aimed, not at particular acts, but at later consequences of those acts.

Finally, in People of State of Illinois v. E. Frank Jones, 329 Ill. App. 503 (4th Dist., 1946), the court upheld application of a statute, which made an unplugged well a public nuisance, to a well which had been abandoned prior to passage of the statute. The court reasoned as follows:

The legislature has the power to declare certain situations or conditions to be nuisances though they were not so regarded at common law. 39 Am. Jur. Nuisances, § 12, p. 293, § 13, p. 294; City of Chicago v. Shaynin, 258 Ill. 69; North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207; Laugel v. City of Bushnell, 197 Ill. 20. A nuisance of this character would certainly not terminate because 18 months had elapsed since the first time the condition existed, for the nuisance is a continuing one and each day that the said well remained unplugged would constitute another offense. [329 Ill. App. at 506.]

Likewise, in the present case, even if the specific acts of disposal took place in the past, if an imminent and substantial endangerment to health and the environment may be presented, a suit pursuant to Section 7003 is appropriate.

On pages 32 and 33 of its brief, Reilly Tar raises the issue of whether Section 7003 might be invalid retroactive legislation if it applies to cases like this one where direct human activity ceased before the passage of RCRA. However, as the court in Solvents Recovery Service of New England stated, "The mere fact that the complaint in a Section 7003 action may refer to pre-RCRA acts that allegedly caused or contributed to the imminent hazard which the government seeks to abate or remedy does not make the statute a retroactive one." 496 F. Supp. at 1142, n. 26. The principle that a statute is not retroactive merely

because it may depend on antecedent facts for its operation is supported by numerous cases. See Cox v. Hart, 260 U.S. 427, 435 (1922); Lewis v. Fidelity & Deposit Co. of Maryland, 292 U.S. 559, 570-71 (1934); Savorgnan v. United States, 338 U.S. 491, 504 n. 21(1950). The fact that Reilly Tar may have disposed of hazardous wastes prior to the passage of RCRA does not preclude it being held responsible now for the remedying of the imminent and substantial endangerment which may exist.

In addition, even if Section 7003 is considered to be retroactive, it would not be invalid. While it is true that statutes usually are not to be construed to operate retroactively unless there is clear legislative intent that they do so, a principal exception to this rule is that remedial statutes are generally held to operate retroactively. 82 C.J.S. Statutes §421; Barr v. Preskitt, 389 F. Supp. 496, 498-500 (M.D. Ala., 1975); Howard v. Allen, 368 F. Supp. 310, 315 (D.S.C. 1973), affirmed 487 F.2d 1397 (4th Cir., 1973), cert. denied, 417 U.S. 912 (1974); Standard Acc. Ins. Co. v. Miller, 170 F.2d 495 (7th Cir., 1948). As stated in Ohlinger v. United States, 135 F. Supp. 40, 42 (D. Idaho, 1955):

A statute merely affecting the remedy may apply to, and operate on, causes of action which had accrued and were existing at the time of the enactment of the statute, as well as causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment.

Section 7003 is a remedial statute and thus can be applied retroactively.

The district court in United States of America v. Diamond Shamrock Corporation, N.D. Ohio, Civil Action No. C80-1857 (May 29, 1981) ruled that Section 7003 did not create an impermissible retroactive application in that case where, as in this case, direct human acts of disposal ceased in 1972. The court explained its conclusion as follows:

To hold that remedial environmental statutes could or should not apply to conduct engaged in antecedent to the enactment of such statutes, when the effects of such conduct create a present environmental threat, would constitute an irrational judicial foreclosure of legislative attempts to rectify pre-existing and currently existing environmental abuses. [May 29, 1981 order at 10.]

See also, United States v. Solvents Recovery Service of New England, et al., 496 F. Supp. 1127 at 1141-1142 (D. Conn. 1980).

Thus, case law, along with the language of RCRA and legislative history, establish that Reilly Tar's assertion that Section 7003 can only be used to restrain ongoing activity is incorrect. Allegations of present activity by Reilly Tar are not necessary in order to state a valid claim pursuant to Section 7003.

### III THE COMPLAINT STATES A CLAIM ABSENT ALLEGATIONS OF AN INTERSTATE EFFECT OF POLLUTION

A second jurisdictional or evidentiary test which Reilly Tar asserts must be met to state a claim under Section 7003 is that it must be alleged that the pollution which is the subject of the suit has an interstate effect. The United States disagrees

that such a test is required. Because this is a statutorily created cause of action, rather than one brought under the federal common law of nuisance, one looks to the statute, rather than the federal common law of nuisance, to determine the necessary elements of a claim, and Section 7003 does not make an interstate effect an element of a claim. Furthermore, to read such a requirement into Section 7003 would contravene the policy of that provision, as well as that of RCRA as a whole. The nuisance cases requiring a showing of interstate effect are simply not relevant to this case.

The district court in United States of America v. Diamond Shamrock Corporation, N.D. Ohio, Civil Action No. C80-1857 (May 29, 1981) explicitly made the distinction between claims brought pursuant to Section 7003 and those brought pursuant to the federal common law of nuisance. In that case, unlike this one, there was a claim under the common law of nuisance as well as under Section 7003. The district court stated that it was "incumbent upon this Court to initially distinguish between an action founded upon the federal common law doctrine of nuisance and an action founded upon 42 U.S.C. §6973 ...." May 29, 1981 order at 3. The court then went on to uphold the Section 7003 claim while dismissing the common law nuisance claim because the complaint did not contain allegations of interstate effects of pollution. May 29, 1981 order at 7. Thus, while determining that allegations of interstate effects of pollution were necessary to state a claim under the common law of nuisance, the court in Diamond Shamrock did not find such allegations necessary to state a claim brought pursuant to Section 7003.

The Eight Circuit in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir., 1975) recognized that one looks to statutory language to determine the elements of a statutory claim. As discussed above, in Part I of this brief, the court in Reserve Mining upheld the district court determination that Reserve's discharges into Lake Superior constituted "pollution of waters 'endangering the health or welfare of persons' within the terms of §§1160(c)(5) and (g)(1) of the Federal Water Pollution Control Act..." 514 F.2d at 529, while, at the same time denying claims under the federal common law of nuisance. In upholding the statutory claim the court stated: "We are not here concerned with standards applied to abatement of a nuisance under nonstatutory common law doctrines." 514 F.2d at 529, n. 71. The court thus explicitly recognized the distinction between statutorily-created claims and those brought under the common law of nuisance, looking to the statute itself, and not the common law of nuisance, when ruling on the statutory claim. Similarly, in this case, this Court should look to the language of Section 7003, without resort to common law, to determine what tests must be met to state a claim under Section 7003.

An examination of Section 7003 reveals that there is no mention of interstate effects as an element of a claim for relief brought under that provision. The provision is concerned with disposal of hazardous waste which "may present an imminent and substantial endangerment to health or the environment."

In addition, other sections of RCRA support the view that interstate effects need not be alleged under Section 7003. The definition of the term "disposal", which is used in Section 7003, is concerned, not with any specific interstate effect, but rather with disposal of hazardous wastes "into or on any land or water" so that the wastes may enter the air or be discharged into "any waters, including groundwaters." Section 1004(3), 42 U.S.C. §6903(3) (emphasis added). This language is very broad and, by its plain meaning, would encompass intrastate contamination, as well as interstate contamination.

Congress, in enacting RCRA, made no distinction between interstate and intrastate pollution. Both kinds of pollution are covered by RCRA. Congress found that "with respect to the environment and health, that...disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment...." Section 1002(b)(2), 42 U.S.C. § 6901(b)(2). Congress also found that "hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste...." Section 1002(b)(5), 42 U.S.C. § 6901(b)(5). Further, the objectives of RCRA are "to promote the protection of health and the environment and to conserve valuable materials and energy sources by ... regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment...." Section 1003(4), 42 U.S.C. §6902(4).

The legislative history of RCRA contains nothing to indicate that Section 7003, or any other part of the statute, is limited to cases where interstate effects of pollution are found. Indeed, the focus and concerns of Congress would not be satisfied if use of Section 7003 were limited to cases of interstate effect of pollution. The House Report described the policy supporting RCA's enactment as follows:

The problems associated with discarded materials which prompted the committee to enter an area which has traditionally been considered the sphere of local responsibility are greater than just the increasing volume of discarded materials...

The overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes - those which by virtue of their composition or longevity are harmful, toxic or lethal. [H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 3; reprinted in [1976] U.S. Code Cong. and Ad. News at 6240-6241.]

The House Report also states as follows:

Although the disposal of discarded materials has traditionally been considered a local problem, it is in fact one of broader scope....Most manufactured products in this country are made at a location other than the one at which they are used and again differ from the one at which they are disposed. By tracing the waste to its origin as a useful product it is clear that most of our discarded materials have at some time entered the flow of interstate commerce (if not as waste itself, than in the form of products which will at some time constitute waste).

The fact that waste itself is in interstate and intermunicipal commerce has raised a number of problems. (Generally hazardous waste is more likely to be the subject of interstate transportation than is non-hazardous industrial or municipal waste)....

Even more threatening are the present disposal practices for hazardous waste. Current estimates indicate that approximately 30-35 million tons of hazardous waste was literally dumped on the ground each year. Many of these substances can blind, cripple or kill. They can defoliate the environment, contaminate drinking water supplies and enter the food chain under present, largely unregulated disposal practices...It is the purpose of this legislation to assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal. [H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess. 9-11, reprinted in [1976] U.S. Code Cong. and Ad. News at 6247-6249.]<sup>17/</sup>

Reilly Tar concedes that the regulatory scheme established by Subtitle C is not limited in application to cases of interstate pollution. Reilly Tar brief at 46-47. It acknowledges that Congress was responding to incidents of intrastate as well as interstate pollution when enacting a program of permits and guidelines. Reilly Tar brief at 46, n. 30. Yet Reilly Tar offers no reason why Congress would have intended for Section 7003 to be limited to cases of interstate pollution when the regulatory program was not similarly limited. Section 7003 is part of Congress' effort

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<sup>17/</sup> See also H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 17-23, 37-38, reprinted in [1976] U.S. Code Cong. and Ad. News at 6254-61, 6274-76, where numerous incidents of intrastate pollution resulting from the disposal of hazardous waste are listed.

There is no question that Congress has authority to pass legislation where there is an effect on interstate commerce. Wickard v. Fillburn, 317 U.S. 111 (1942); Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Reilly Tar's activities at its site in St. Louis Park have had the effect on interstate commerce described in the House Report.

to provide nationwide protection against the dangers of hazardous waste disposal. Indeed, since Section 7003 is concerned with imminent and substantial endangerments, and not with the often less severe waste disposal problems handled by the Subtitle C regulatory program, Section 7003, if any provision in RCRA, ought to cover intrastate as well as interstate pollution problems.

The district court in United States v. Solvents Recovery Service of New England, et al., 496 F. Supp. 1127 at 1139 (D.Conn. 1980) concluded that "conditioning a Section 7003 claim on the allegation of such interstate effects would be fundamentally inconsistent with the character of the pollution which is the target of the legislation and incompatible with the nature and extent of the federal concern embodied in RCRA." This Court should rule in the same manner.

Reilly Tar relies upon several cases where courts have required interstate pollution of air or water to support claims brought pursuant to the federal common law of nuisance. Reilly Tar brief at 39-44. However, because, as discussed above, this suit is brought pursuant to Section 7003, and not the federal common law of nuisance, the conclusions of the courts in those cases as they relate to the federal common law of nuisance are irrelevant to this case.

However, even if the common law nuisance cases are relevant, they do not support the requirement of an interstate effect in this case. The Seventh Circuit explicitly stated

an interstate effect was not required in a federal common law of nuisance case. In People of the State of Illinois v. Outboard Marine Corporation, 619 F.2d 623(7th Cir.

1980) the Court stated as follows:

When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects. The issue is whether the dispute is a matter of federal concern. [619 F.2d at 630.]

In addition, in United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt., 1973), affirmed without opinion, 487 F.2d 1393 (2nd Cir., 1973), cert. denied, 417 U.S. 976 (1974), the Court granted injunctive relief under the federal common law of nuisance without any mention of interstate effect. Instead, the Court focussed on the "defendants' unreasonable interference with the public's rights in the waters of Lake Champlain...." 363 F. Supp. at 121. See also National Sea Clammers Association v. City of New York, 616 F.2d 1222 (3rd Cir, 1980), cert. granted sub nom. Middlesex County Sewage Authority v. National Sea Clammer's Ass'n, 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980); United States v. Solvents Recovery Service of New England et al, 496 F. Supp. 1127 at 1134-1139(D. Conn., 1980).

It is correct that some courts have required an interstate effect in order to establish a claim under the federal common law of nuisance. However, those cases are limited in their applicability to this case. In Reserve Mining

Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir., 1975), discussed above, while stating that federal nuisance law contemplates interstate pollution of air and water, 514 F.2d at 520, the Court did not make that a requirement for establishing a claim under a statutory cause of action concerning groundwater such as the one in this case. The Eighth Circuit also stated that its conclusion that federal nuisance law contemplates interstate pollution was formulated by the Supreme Court in Illinois v. City of Milwaukee, 406 U.S. 91(1972). 514 F. 2d. at 520. However, that may be a misstatement of the Supreme Court's reasoning in Illinois v. Milwaukee. In fact, the Supreme Court was concerned with interstate waters, not interstate effects. 406 U.S. at 105-107. Its focus was upon the fact that the waters being polluted were interstate or navigable. It did not appear to be very much concerned with whether or not the pollution was actually having an effect on a state other than the one from which the pollution originated. Thus, the court in Reserve Mining may have misconstrued the common law requirement formulated in Illinois v. Milwaukee when it ruled that the federal nuisance law contemplates interstate pollution.

The other common law nuisance cases discussed by Reilly Tar suffer from the same defect in reasoning as Reserve Mining.<sup>18/</sup> In addition, they are further limited in their applicability to this case by the fact that the nuisance claims were raised by private parties, rather than governmental

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<sup>18/</sup> That is also true of United States of America v. Diamond Shamrock Corporation, N.D. Ohio, Civil Action No. C80-1857 (May 29, 1981) at 5-7.

entities. Courts have been less willing to entertain suits for injunctive relief in cases involving private parties than in cases involving governmental entities. See Georgia v. Tennessee Copper Co., 206 U.S. 230 at 238 (1907).

In sum, an allegation of an interstate effect of pollution is not necessary to state a claim against Reilly Tar under Section 7003. Reilly Tar's motion to dismiss must be denied.

#### IV THE COMPLAINT ALLEGES AN IMMINENT AND SUB- STANTIAL ENDANGERMENT

The third evidentiary test which Reilly Tar asserts must be met to state a claim under Section 7003 is that the complaint must allege that an imminent and substantial endangerment to health or the environment may be presented. Reilly Tar argues that the complaint in this case fails that test because it does not allege a true "emergency situation." Reilly Tar brief at 51.

In contrast to its opinion that the two other evidentiary tests discussed by Reilly Tar are not required in a Section 7003 case, see parts I and II above, the United States agrees that its complaint must allege that an imminent and substantial endangerment may be presented. However, the United States has made those allegations.

The facts, as stated in the complaint, are that many of the chemicals found in the wastes disposed of by Reilly Tar are carcinogens and are toxic. Complaint at paragraphs 12-15. The wastes spilled, leaked, and were discharged directly into the ground at the site for over 55 years and from

there entered and are continuing to enter groundwater which is used as a water supply for the City of St. Louis Park and other surrounding communities. Complaint at paragraphs 16-22. Reilly Tar may be alone in its view that this fact situation represents merely a chronic or generally recurring pollution problem and not an emergency.<sup>19/</sup>

That a fact situation like that in this case may present an imminent and substantial endangerment is supported by decisions in other Section 7003 cases. In United States v. Vertac Chemical Co., 489 F. Supp. 870 at 885 (E.D. Ark. 1980) the escape of dioxin from a site was held to constitute an imminent and substantial endangerment to health and a preliminary injunction was issued. Following the lead of the Eighth Circuit in Reserve Mining Co. v. Environmental Protection Agency, 514 F. 2d 492 (8th Cir., 1975), the court found an imminent and substantial endangerment resulting from the runoff of surface water and groundwater from soil and wastes containing dioxin. As with the wastes in this case, the dioxin wastes were no longer being produced but remained on and around the site after production had ceased. The court concluded as follows:

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<sup>19/</sup> The Clean Air Act legislative history relied upon by Reilly Tar states that chronic or generally recurring pollution problems should be dealt with under other provisions of the Clean Air Act. See Reilly Tar brief at 51. Other provisions of RCRA, however, are not adequate to remedy the problem in this case because they do not generally cover abandoned or inactive sites. Reilly Tar concedes the limited coverage of most of RCRA. Reilly Tar brief at 18-20.

In the context of the term "endangerment" as defined in Reserve, the record shows that dioxin is escaping from the Vertac plant site in quantities that under an acceptable but unproved theory may be considered as teratogenic, mutagenic, fetotoxic, and carcinogenic. Such gives rise to a reasonable medical concern over the public health. We therefore hold that the escape of dioxin into Rocky Branch Creek and Bayou Meto from the plant site constitutes "an imminent and substantial endangerment to health of persons" (33 U.S.C. §1364, 42 U.S.C. §6973) and is subject to abatement. [489 F. Supp. at 885 (footnote omitted)]

In United States of America v. Royal N. Hardage, Civ-80-1031-W, Order of December 2, 1980 (W.D.Okla.) the court denied the defendant's motion to dismiss in which the defendant had argued that the complaint did not allege facts sufficient to invoke the "emergency" provision of RCRA, Section 7003. The court ruled that the complaint, which alleged that the defendant operated a hazardous waste dump site from which dangerous chemicals were escaping, adequately alleged an imminent and substantial endangerment. The court stated: "The plaintiff, however, has made a convincing argument that the imminence of a hazard does not depend on the proximity of the final effect but may be proven by the setting in motion of a chain of events which could cause serious injury." December 2, 1980 order at 3-4. 20/

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20/ The December 2, 1980 order is attached to this brief as Attachment 2.

That reasoning is applicable to this case as well.

An imminent and substantial endangerment may exist even though the final effect on health or the environment of Reilly Tar's waste disposal practices may not be obvious until some time in the future. Harm to the environment clearly exists at present because of the soil and groundwater contamination. Harm to health is more difficult to measure, but it is no answer to the health hazard emanating from the Reilly Tar site to say that harm to health can be avoided by not drinking the groundwater. 21/

V. THE RELIEF SOUGHT IS WITHIN  
THE SCOPE OF SECTION 7003

The final argument made by Reilly Tar is that most of the claims for relief included in the complaint must be dismissed because Section 7003 of RCRA can only be used to immediately restrain an emergency situation. Reilly Tar brief at 55-58. However, Reilly Tar is not able to offer any direct support for this view.

The plain meaning of Section 7003, supported by its legislative history, is that the relief available under the provision is much broader than Reilly Tar insists. The phrase "or to take such other action as may be necessary" in Section

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21/ For additional discussion of the imminent and substantial endangerment standard, see parts I and II of the Minnesota brief.

On pages 53-54 of its brief, Reilly Tar argues that this Court lacks jurisdiction in this case under both 28 U.S.C. §1331 and 28 U.S.C. §1345 because this case neither arises under the laws of the United States nor is authorized by law. Reilly Tar's argument is without support. This suit, as discussed above, arises under and is authorized by Section 7003 of RCRA.

7003 is not tied only to the relief of stopping disposal activity but extends beyond it. It offers additional relief to the district court beyond immediately restraining an activity causing a hazard.

This meaning of the phrase is supported by the legislative history for Section 7003. The Senate Report states as follows:

The suit is to be brought in the appropriate federal district court, which could immediately restrain any person causing or contributing to the alleged disposal from continuing such disposal or take other action as may be necessary. [S. Rep. No. 94-988, 94th Cong., 2d Sess. at 16 (1976) (emphasis added).]

The phrase "or to take such other action as may be necessary" is thus a guide to the district court that it may do more than immediately restrain a person.

The Eckhardt Report also offers guidance as to the relief obtainable under Section 7003:

Like a number of other environmental and health acts, the Resource Conservation and Recovery Act authorizes the EPA Administrator to go to Federal Court and seek the abatement of a hazardous waste problem if he determines that the transportation, generation, storage, disposal, or treatment of such waste presents an imminent hazard to man or the environment. This power is granted the Administrator in section 7003 of RCRA....

Section 7003 is designed to provide the Administrator with overriding authority to respond to situations involving a substantial endangerment to health or the environment, regardless of other remedies available through the provisions of the Act. The section's broad authority to "take such other actions as may be necessary" includes both short and long term injunctive relief, ranging from construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration. [Eckhardt Report at 31-32.]

There is no doubt that at least part of Congress views Section 7003 as providing for relief beyond immediately restraining an emergency situation.

Case law developed thus far under Section 7003 also recognizes the broad relief available under Section 7003. While acknowledging that Section 7003 was not to be used as a general "clean-up statute", the district court in United States v. Solvents Recovery Service of New England et al., 496 F. Supp. 1127 (D.Conn. 1980) concluded that Section 7003 could "be invoked even where a simple restraining order would be unavailing because the defendants had already desisted from the disposal practices which caused the pollution," 496 F. Supp. at 1143, 1140. In that case, the complaint, as in this case, seeks removal of soil and groundwater contamination as well as other relief aimed at protection of drinking water supplies.

The court in Solvents Recovery Service of New England recognized that other courts had ordered relief that went beyond immediate restraint of activity, 496 F. Supp. at 1143. See United States v. Vertac Chemical Corporation, 489 F. Supp. 870 at 888-889 (E.D. Ark., 1980) and United States v. Midwest Solvent Recovery Inc., 484 F. Supp. 138 at 145 (N.D. Ind. 1980). The court in Solvents Recovery Service of New England concluded that it could not hold as a matter of law that Section 7003 did not authorize the relief sought and stated that it would not be appropriate to strike any part of the relief before the plaintiff had an opportunity to make its case. 496 F. Supp. at 1143.

The Court in this case should also withhold any judgment on the validity of any of the relief sought in the complaint until after a determination of the facts. While relief beyond immediately restraining an emergency situation is authorized under Section 7003, further development of the facts is necessary to determine what specific relief may or may not be appropriate in this particular case.

#### CONCLUSION

The United States submits that its complaint states a claim upon which relief may be granted. The complaint alleges all the facts necessary to state a cause of action under Section 7003 of RCRA by alleging that the disposal of hazardous wastes at the Reilly Tar plant site in St. Louis Park may present an imminent and substantial endangerment to health or the environment. Allegations of present human activity or of an interstate effect of the pollution are not necessary to state a claim under Section 7003. The allegations in the complaint show that an imminent and substantial endangerment to health and the environment exists which supports a claim under Section 7003.

The United States further submits that the relief sought in the complaint is appropriate. Section 7003 is intended to provide for abatement of conditions which may present an imminent and substantial endangerment to health and the environment, and all relief which would accomplish this abatement is necessary and appropriate under Section 7003.

Reilly Tar's position, in the end, is that, although its activities may have created an imminent and substantial endangerment to health and the environment, it cannot now be required to remedy the endangerment. This position cannot be sustained.

For the foregoing reasons, the motion to dismiss of Reilly Tar and Chemical Corporation should be denied.

Respectfully submitted,

JOHN M. LEE  
United States Attorney

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FRANCIS X. HERMANN  
Assistant United States Attorney

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Washington, D. C. 20530

FILED

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CLEVELAND

THE UNITED STATES DISTRICT COURT  
THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

DIAMOND SHAMROCK CORPORATION,

Defendant

CIVIL ACTION NO. C80-1857

MEMORANDUM AND ORDER

KRUPANSKY, J.

This is a civil action initiated by plaintiff United States under §7003 of the Resource Conservation and Recovery Act of 1976 as amended (RCRA), 42 U.S.C. §6973, and the federal common law doctrine of nuisance seeking injunctive relief designed to abate an alleged imminent and substantial endangerment to health and the environment arising from the disposal of hazardous chromium wastes by defendant Diamond Shamrock Corporation (Diamond Shamrock) on property in Painesville, Ohio. Hexavalent chromium, an adduced known human carcinogen and a substance highly toxic to aquatic life, is averred to have migrated from defendant's disposal site into waters, including the Grand River, thereby endangering the aquatic life therein. Plaintiff also demands reimbursement of expenditures incurred in the investigation of defendant's adduced violations. Jurisdiction is purported to arise pursuant to 28 U.S.C. §1345 and 42 U.S.C. §6973. Notice of commencement of this action has been provided to the State of Ohio as required by 42 U.S.C. §6973.

The complaint, pleaded with specificity, purports the following: between the years 1931 and 1972 approximately three-quarters of a million tons of chromate wastes were hauled from

ATTACHMENT 1

defendant's chromate plant in railroad cars and open-dumped, discharged, deposited and placed in piles on the surface of the chromate site; approximately 7,500 tons of said wastes are comprised of hexavalent chromium, a known carcinogenic; the current United States Environmental Protection Agency recommended water criterion for hexavalent chromium for the protection of aquatic life is 10 parts per billion (ppb) in ambient water as a 24-hour average; the State of Ohio water quality standard, approved by the U.S. Environmental Protection Agency, for total chromium (trivalent and hexavalent) in the Grand river downstream from the chromate site is 100 ppb; the hexavalent chromium is migrating into and entering the environment and waters, including the Grand River which flows within 40 feet of the chromate site; eight individual samples taken from the Grand River adjacent to and downstream from the chromate site on July 31, 1980 ranged from 102 ppb to 392 ppb of hexavalent chromium; in two different 24-hour river sampling surveys performed by EPA on July 31-August 1, and August 13-14, 1980 hexavalent chromium was discovered in excess of EPA's proposed Water Quality Criteria of 10 ppb for aquatic life (results of the 24-hour EPA composite sampling surveys on the Grant River revealed 24-hour average concentrations of 40 ppb and 60 ppb hexavalent chromium approximately 1300 feet downstream from the chromate site); the aquatic life, some of which are listed on the endangered species list, are endangered by the chromium leaving defendant's disposal site.

Presently before the Court is defendant Diamond Shamrock's Motion for Summary Judgment pursuant to Rule 56, Fed. R. Civ. P., which states in pertinent part:

- (c) Motion and Proceedings Thereon . . . . The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Sixth Circuit has enunciated the standard to be applied in the determination of a Rule 56 motion:

In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated.

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962), followed by: Bd. of Educ. of City of School Dist. of the City of Cincinnati, et al. v. HEW, 532 F.2d 1070, 1071 (6th Cir. 1976); U. S. v. Articles of Device Consisting of Three Devices . . . "Diapulse", et al., 527 F.2d 1008, 1011 (6th Cir. 1976); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1093 (6th Cir. 1974); Bosely, et al. v. City of Euclid, et al., 496 F.2d 193 (6th Cir. 1974); Avery Products Corp. v. Morgan Adhesives Co., 496 F.2d 254, 257 (6th Cir. 1974). See also U. S. v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed. 2d 176 (1962).

This Motion presents the threshold issue of whether plaintiff's action as founded upon the doctrine of federal common law nuisance is precluded pursuant to a failure to aver interstate effects of pollution. The instant complaint does not purport directly or indirectly the existence of an endangerment to an environment situated outside the State of Ohio.

It is incumbent upon this Court to initially distinguish between an action founded upon the federal common law doctrine of nuisance and an action founded upon 42 U.S.C. §6973 which states:

#### **Imminent Hazard**

(a) Authority of Administrator. -- Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing

such orders as may be necessary to protect public health and the environment.

(b) Violations. -- Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) of this action may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$5,000 for each day in which such violation occurs or such failure to comply continues.

42 U.S.C. §6973, as amended, Pub. L. 96-482, 94 Stat. 2343 (October 21, 1980).

Precedent exists in support of the proposition that §6973 is solely jurisdictional in nature. Midwest Solvent Recovery, Inc., 484 F.Supp. 138 (N.D. Ind. 1980) held that the broadly encompassing "imminent hazard" provision of §6973 could not fairly be interpreted as a source of substantive duties or liabilities:

[B]ecause §(6973) is as broadly worded as it is, if it were intended to function as a liability-creating provision, it would appear to make liable even those who contribute to the handling, storage, treatment, transportation or disposal of solid or hazardous wastes in such a way that an imminent and substantial endangerment to health or the environment is created. Any provision that could logically be read so to expand the set of persons liable under the federal solid and hazardous waste regulatory scheme would surely be identified as such in the legislative history. Finally, (RCRA) elsewhere establishes by regulations the standards of conduct that must be followed by those who generate, transport, or own or operate facilities that treat, store, or dispose of hazardous wastes.

Id. at 144.

This conclusion found acceptance in U.S. v. Solvents Recovery Service of New England, 496 F.Supp. 1127 (D. Conn. 1980) which stated:

[S]ection (6973) does not itself establish standards for determining the lawfulness of the conduct of those sued by the United States. In an appropriate case, those standards might be found elsewhere in RCRA or in the regulations promulgated pursuant to RCRA, or in the federal common law of nuisance, . . .

Id. at 1134. Accordingly, these authorities interpret §6973 as a jurisdictional vehicle devoid of substantive standards.

The Court notes, however, that §6973 is both jurisdictional and substantive in nature. The standard for deter-

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mining the impropriety of the conduct sought to be enjoined is provided by §6973 to be whether a "hazardous waste" presents an "imminent and substantial endangerment to health or the environment". §6973 provides for injunctive relief in emergency situations which the EPA Administrator discretionally determines, upon receipt of evidence, to warrant immediate abatement. The environmental endangerment must be both imminent and substantial, concepts with rich judicial and statutory histories. This standard is contrasted with the other provisions of RCRA, and regulations promulgated thereunder, which address day-to-day regulation of waste disposal and other less imminent and threatening situations.

The conclusion of this Court that §6973 is substantive is supported by U. S. v. Vertac Chemical Corporation, 439 F.Supp. 870 (E.D. Ark. 1980), wherein "the parties. . . focused their attention on whether discharges from the (waste) site constitute[d] 'imminent and substantial endangerment'". Id. at 884-85.

Last, it is noted that broadly stated substantive standards are not foreign to remedial environmental statutes. See e.g., Federal Water Pollution Control Act, 33 U.S.C. §1251 et. seq. ("imminent and substantial endangerment", 33 U.S.C. §1364); Toxic Substances Control Act, 15 U.S.C. §2606 ("imminently hazardous chemical substance").

The foregoing establishes the distinguishability of an action founded upon the federal common law doctrine of nuisance from an action founded upon §6973. Axiomatically, these two causes of action will be considered separately, beginning with the common law action.

Since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 83 L.Ed. 1188 (1938) repudiated the concept of a general federal common law, specialized common laws have developed in areas presenting an overriding federal interest and a need for uniform rules of decision. The Supreme Court decision of Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31

L.Ed.2d 712 (1972); in initially applying federal common law in the interests of federalism to an action involving the pollution of Lake Michigan (bounded by four States), has been interpreted by the majority of circuits as necessitating interstate effects of pollution as a prerequisite to a federal common law nuisance action. See: Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir. 1979), cert. denied, 444 U.S. 922, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979) ("No federal common law action will lie . . . 'where there is no allegation of interstate effect' attending the pollution". Id. at 445, citing Committee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492, 520-21 (8th Cir. 1975), modified on other grounds, 529 F.2d 181 (1976) ("[F]ederal nuisance law contemplates, at a minimum, interstate pollution of air or water". Id. at 510); Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1281 (D. Conn. 1976), aff'd without opinion sub nom. East End Yacht Club v. Shell Oil Co., 573 F.2d 1289 (2nd Cir. 1977). See also, Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); Michie v. Great Lakes Steel Division, 495 F.2d 213 216, n.2 (6th Cir.), cert. denied, 419 U.S. 997 (1974) (dictum). These authorities are persuasive. The increasing federal interest in the abatement of pollution, as evidenced by the relatively recent enactment of various remedial environmental statutes, provides insufficient justification to abandon the federal common law requirement of interstate pollution effects as implicitly established in Illinois v. City of Milwaukee, supra. On the contrary, the expansion of legislation into environmental areas creates less of a need for the fashioning of federal common law. See, e.g., City of Milwaukee v. Illinois, Case No. 79-408 (Apr. 28, 1981), wherein the Supreme Court concluded that the Federal Water Pollution Control Act Amendments of 1972 have occupied the field of water pollution control, thereby making inappropriate the "application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence". Slip op. at 10. Accordingly, this Court

must reject those authorities which have directly or indirectly recognized the cognizability of nuisance actions without the presentation of interstate effects of pollution. See: U.S. v. Solvents Recovery Service of New England, 496 F.Supp. 1127 (D. Conn. 1980); Illinois v. Outboard Marine Corp., 619 F.2d 623, 630 (7th Cir. 1980), cert. pending, 49 U.S.L.W. 3043 (Aug. 12, 1980); In re Oswego Barge Corp., 439 F.Supp. 312, 322 (N.D. N.Y. 1977); U.S. ex rel. Scott v. U.S. Steel Corp., 356 F.Supp. 556 (N.D. Ill. 1972); U.S. v. Ira S. Bushey & Sons, Inc., 346 F.Supp. 145 (D.Vt. 1973), aff'd mem., 487 F.2d 1393 (2nd Cir. 1973), cert. denied, 417 U.S. 976 (1974).

No genuine issue exists as to the material fact of whether the alleged environmental endangerment encompasses territories outside the State of Ohio. Further, defendant is entitled to judgment as a matter of law with respect to plaintiff's cause of action founded upon the federal doctrine of common law nuisance pursuant to plaintiff's failure to adduce interstate effects of pollution. Accordingly, defendant's Motion for Summary Judgment on this claim must be granted.

Defendant's Motion for Summary Judgment also presents the threshold issue of whether §6973 is applicable to situations wherein the alleged imminent and substantial endangerment to the environment is resultive from acts engaged in antecedent to the enactment of the statute. The affidavit of George R. Bargieri, former Plant Manager of defendant's Chromate Plant, establishes that all disposal of chromate wastes at the chromate site ceased when the Chromate Plant was closed in January, 1972 and that no chromate wastes have been brought onto the site thereafter. Moreover, §6973 did not become effective until October 21, 1976.

The determination that §6973 is applicable to present conditions resulting from antecedent acts is supported by an examination of the language of the statute, other sections of RCRA, and the legislative history thereof, each considered seriatim hereafter.

§6973 states in pertinent part:

(a) Authority of Administrator. Notwithstanding any other provision of Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . (emphasis added).

42 U.S.C. §6973. Clearly this statute does not necessitate the demonstration of active human participation as a prerequisite to its application. Further, the improper "disposal" of solid or hazardous wastes as prohibited by this statute is defined as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. (emphasis added).

42 U.S.C. §6903(3). A "disposal" clearly requires no active human conduct.

The "Objectives" of RCRA also indicate the applicability of §6973 to existing waste disposal sites without regard to the date of creation of such site. 42 U.S.C. §6902 states:

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by--

\* \* \*

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which to not pose a danger to the environment or to health;

(4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment; (emphasis added).

Although it has been aptly noted that the legislative history of §6973 is "quite sketchy", Midwest Solvent Recovery, Inc., supra, at 143, guidance is provided by House Committee on Interstate and Foreign Commerce Report, 96th Cong. 1st Sess. (1979), Committee Print 96-IFC 31 (Eckhardt Report), wherein §6973 is referred to as "the only tool that it (RCRA) has to remedy the effects of past disposal practices which were not

sound . . ." Id. at 31. This supportive authority further refers to §6973 "imminent" as relating to the

nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at sometime in the past but which continue to present a threat to the public health or the environment.

Id. at 32. This secondary authority is entitled to "careful consideration". Parker v. Califano, 561 F.2d 320, 339 (D.C. Cir. 1977). See also Bobsee Corp. v. U.S., 411 F.2d 231, 237 n. 18 (5th Cir. 1969); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-81, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1968); Sioux Tribe of Indians v. U.S., 316 U.S. 317, 329, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942).

The legislative history of the 1980 Solid Waste Disposal Act Amendments further provides:

The Committee intends that the Administrator use this authority where the risk of serious harm is present. . . The Administrator's authority under Section (6973) to act in situations presenting an imminent hazard should be used for abandoned sites as well as active ones.

H. R. Report No. 96-191, 96th Cong. 1st Sess. 5 (1979).

Last, the only known reported federal decision to address the instant issue has concluded:

Section (6973) is designed to abate and remedy conditions which constitute imminent hazards to health or the environment. Its focus is on the prevention and amelioration of conditions, rather than the cessation of any particular affirmative human conduct.

\* \* \*

Section (6973) does not on its face discriminate between cases of a present harm caused by past disposal practices and cases of a present harm caused by ongoing practices.

Solvents Recovery Service of New England, supra, at 1139-40.

Accordingly, this Court concludes that §6973 is applicable to situations wherein the alleged imminent and substantial endangerment to the environment is resultive from acts engaged in antecedent to the enactment of the statute.

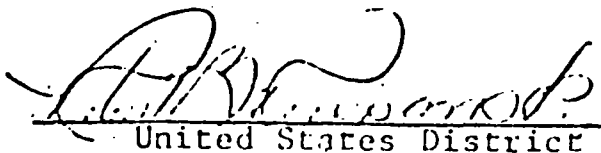
The tangential issue of whether §6973, as applied to antecedent acts, creates an impermissible retroactive application must be answered negatively. §6973 provides for injunctive

relief, as opposed to compensatory or punitive relief, of conditions presently existing. To hold that remedial environmental statutes could or should not apply to conduct engaged in antecedent to the enactment of such statutes, when the effects of such conduct create a present environmental threat, would constitute an irrational judicial foreclosure of legislative attempts to rectify pre-existing and currently existing environmental abuses. The Sixth Circuit has stated, in a decision involving the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 et seq., that despite the general rule providing for strict and narrow construction of penal statutes, water pollution legislation is to be afforded a generous construction. U.S. v. Hamel, 551 F.2d 107, 112 (6th Cir. 1977). See also: U.S. v. Standard Oil Co., 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966); U.S. v. Republic Steel Corp., 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960); U.S. v. Ashland Oil Transportation Co., 504 F.2d 1317 (6th Cir. 1974). This principle appears to be appropriately applicable to other remedial environmental statutes such as §6973.

The foregoing establishes that §6973 provides a viable substantive cause of action as applied to the instant facts. There currently exists a genuine issue relating to the material fact of whether defendant's waste disposal site is presently creating an imminent and substantial endangerment to the environment. Accordingly, Summary Judgment is inappropriate.

In accordance with the foregoing, defendant's Motion for Summary Judgment with respect to plaintiff's cause of action founded upon the federal common law doctrine of nuisance is hereby granted pursuant to plaintiff's failure to aver interstate effects of pollution. Contrawise, defendant's Motion for Summary Judgment relating to the cause of action predicated upon §6973 is hereby denied.

IT IS SO ORDERED.

  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
ROYAL N. HARDAGE,  
Defendant.

CIV-80-1031-W

FILED

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ORDER

HERBERT T. LANE  
CLERK, U. S. DISTRICT COURT  
DEPUTY

The plaintiff, United States of America, has brought this action through the U. S. Attorney seeking injunctive relief under the provisions of 42 U.S.C. § 6973 against the defendant in his operation of a waste dump site in McClain County, Oklahoma. The defendant has filed a Motion to Dismiss for lack of jurisdiction and failure to state a claim against defendant upon which relief can be granted under F.R.Civ.P. 12(b)(1) and 12(b)(6). Alternatively, the defendant seeks summary judgment under F.R.Civ.P. 56(b). The defendant has offered a brief in support of the motion, the plaintiff has offered a brief in opposition to the motion and the defendant has replied thereto.

The complaint alleges that the defendant operates a hazardous waste dump site in such manner as to allow dangerous concentrations of harmful chemicals to escape into a nearby creek, the air, groundwater, and the surrounding soil. The defendant's Motion to Dismiss does not controvert the plaintiff's factual allegations. Instead, the defendant disputes whether the complaint is sufficient to state a cause of action under § 7003 of the Resource Conservation and Recovery Act (Act), 42 U.S.C. § 6973. That section of the Act provides that:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, or transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate District Court to immediately restrain any person for contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary.

The Administrator shall provide notice to the affected state of any such suit.

The defendant asserts that the complaint does not allege facts sufficient to invoke this "emergency" provision of the Act and that the problems cited in the complaint are properly addressed through other regulations and rules promulgated for non-emergency situations by the Environmental Protection Agency pursuant to the Act. Most concisely, the defendant asserts that that complaint fails to allege the "imminent and substantial endangerment" required to state a claim under § 7003. The defendant's suggestion that the Court lacks jurisdiction is nothing more than a rephrasing of this same argument. The Court has jurisdiction to determine whether a claim has been sufficiently stated and jurisdiction over the matter itself if the allegations are sufficient to state a cause of action under this federal statute. The motion for summary judgment similarly rests on the defendant's argument that the pleadings, briefs, and other materials in the record deny the existence of an imminent and substantial endangerment.

The analysis to be performed in reviewing a Rule 12(b)(6) dismissal has been set out in Mitchel v. King, 537 F.2d 385 (10th Cir.):

"When a complaint and action are dismissed for failure to state a claim upon which relief can be granted, it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974); Hudson v. Harris, 478 F.2d 244 (10th Cir. 1973); Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971). A Motion to Dismiss under Fed. Rules Civ. Proc., Rule 12(b) admits all well pleaded facts in the complaint as distinguished from conclusory allegations. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970). The factual allegations of the complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the complainant. Williams v. Eaton, *supra*; Olpin v. Ideal National Insurance Company, 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074, 90 S.Ct. 1522, 25 L.Ed.2d 809 (1970)."

On a motion for summary judgment, we must construe the facts in a way most favorable to the non-movant. U.S. v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 998, 8 L.Ed.2d 176 (1962).

The existence of any "genuine issues as to any material fact" precludes the grant of summary judgment. Rule 56(c), F.R.Civ.P.

In resolution of the 12(b)(6) motion, the relevant question is whether there exists an "imminent and substantial endangerment" when the allegations of the complaint are viewed as true. In regard to the motion for summary judgment, the relevant question is whether there exists any genuine issue as to any fact material to proving the existence of an imminent and substantial endangerment. To answer these questions, it is first necessary to define the imminent and substantial endangerment standard.

The subject statute is relatively recent in origin and there are few cases construing its terminology. Additionally, those cases considering the statute have found that there is a scarcity of relevant legislative history. U.S.A. v. Solvents Recovery Service of New England and Lori Engineering Co., Civ No. H79-704 (Slip Op. Aug. 20, 1980) (D.C. Conn.); U.S. v. Midwest Solvents Recovery, Inc., 484 F.Supp. 138, 143 (N.D. Ind. 1980). Both of the cited courts noticed that § 7003 is among the miscellaneous provisions of the Act rather than in the substantive provisions under which the administrators of the Act were directed to promulgate regulations and rules. Such being the case, this Court is persuaded that § 7003 is an emergency-type provision and that "situations which do not present true emergencies are better dealt with through the more comprehensive, if more cumbersome, provisions of the [Act] and the EPA regulations promulgated thereunder . . ." U.S.A. v. Solvents Recovery Service, supra, n. 29.

In this context, the phrase "imminent and substantial endangerment" should be taken to mean that sort of emergency situation in which application of the general provisions of the Act would be too time consuming to effectively ward off the threatened harm to health or environment. See, 29A C.J.S. Emergency. In the briefs on this motion, the parties have not effectively addressed this question of when the emergency provision in § 7003 should be used in contrast to when the normal provisions of the Act would be appropriate. The plaintiff, however, has made a convincing argument that the imminen

of a hazard does not depend on the proximity of the final effect but may be proven by the setting in motion of a chain of events which could cause serious injury. See, e.g., Environmental Defense Fund v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972).

The plaintiff alleges in its complaint that the defendant is currently allowing a variety of undeniably dangerous chemicals to escape into the surrounding vicinity and that these discharges pose a direct, if not immediate, threat to human health and the environment. If the allegations of the complaint are taken to be true, this Court must find that an imminent and substantial endangerment exists that requires immediate remedial action. As such, the motion to dismiss for failure to state a claim is lacking and must be denied.

Further, the Court cannot say that there does not exist any genuine issue as to a material fact. Rather, the Court is persuaded that there exists a multiplicity of factual issues as to the nature of the harms involved and whether they should in fact be addressed through a § 7003 emergency proceeding in the district court or be addressed through regular proceedings by the Administrator of the Act. For this reason, the defendant's motion for summary judgment must also be denied. These denials are not in derogation to the merit of the defendant's underlying argument, but simply reflect that the plaintiff has made a case sufficient to cause this action to proceed.

In sum, the defendant's Motion to Dismiss and, in the alternative, Motion for Summary Judgment is denied.

IT IS SO ORDERED this 2<sup>nd</sup> day of December, 1980.

  
UNITED STATES DISTRICT JUDGE